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CHEAH YEE CHEN & ORS v. SAFEWAY SOLUTIONS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[CIVIL SUIT NO: WA-21IP-1-10-2019]
B 12 MAY 2023

Abstract – *An agreement is a franchising agreement if its terms fulfilled the four cumulative conditions stipulated under limbs (a), (b), (c) and (e) of s. 4 of the Franchise Act 1998. In the present application, while the agreements entered between the parties were titled as licensing agreements, since the terms therein satisfied the four conditions, the agreements were held to be franchising agreements. As such, the agreements ought to be registered in accordance with the requirements of s. 6(1), (2) and (B) of the Franchise Act 1998 and the necessary approvals under s. 79 of the Education Act 1996 obtained. Any transgression of such would taint the agreements with illegality and thus, void.*

CONTRACT: *Illegality – Agreement – Licensing agreements for conducting brain development programs for young children – Whether licensing agreements in reality franchising agreements – Whether licensing agreements vitiated by fraud, misrepresentation and undue influence – Whether brain development programs for young children, subject of licensing agreements, approved by Ministry of Education – Whether plaintiffs entitled to compensation under s. 66 of Contracts Act 1950, damages, interests and costs*

After being enticed by the first defendant's representation online, regarding the business opportunity of running a centre dedicated to conducting the first defendant's Ministry of Education's approved 'Brain-Zone Full Brain IQ Program' and 'Brain-Zone World Class Memory Program', respectively, for young and older children, the plaintiffs entered into two licensing agreements with the first and second defendants. Nevertheless, after a few years of running the centres, the plaintiffs terminated the licensing agreements. Notwithstanding the terminations, the plaintiffs also filed an application for a declaration that the licensing agreements were void on the grounds of illegality. According to the plaintiffs, the licensing agreements: (i) in reality were actually franchising agreements that contravened the Franchise Act 1998 ('Franchise Act'); (ii) had contravened ss. 77 and/or 79 of the Education Act 1996 ('Education Act'); and (iii) were entered by the plaintiffs due to the first and second defendants' inducement *via* fraud, deceit, misrepresentation and/or undue influence. Therefore, the licensing agreements were tainted with illegality and thus, void. The plaintiffs posited

further that, in the event the application was successful, the plaintiffs ought to be awarded compensation under s. 66 of the Contracts Act 1950 ('Contracts Act'), damages, interest and costs. The first and second defendants objected to the application. Other than denying the plaintiffs' claims, the first and second defendants also contended that even if the licensing agreements were void or voidable, by virtue of the doctrine in *pari delicto*, the plaintiffs were not entitled to recover any relief from the first and second defendants. Several counterclaims were also filed by the first and second defendants against the plaintiffs for: (i) a declaration that the licensing agreements were valid; (ii) damages and other reliefs for the alleged unlawful termination of the licensing agreements by the plaintiffs; and (iii) damages and other reliefs for the alleged infringement of the first and second defendants' 'Brain-Zone' trademark by the plaintiffs, that the plaintiffs were using the first and second defendants' trademark in operating their centres even after the licensing agreements had been terminated. Therefore, the issues to be determined in the application were: (i) whether the licensing agreements were tainted with illegality; (ii) whether the counterclaims by the first and second defendants ought to be allowed; (iii) whether any of the parties ought to be granted any relief; and (iv) whether liability should be imposed on all the defendants.

Held (allowing plaintiffs' application; dismissing first and second defendants' counterclaims):

(1) Under s. 4 of the Franchise Act, an agreement is a franchising agreement if the four cumulative conditions as set out in limbs (a), (b), (c) and (e) of the section are fulfilled. The four conditions were prevalent throughout the terms of the licensing agreements. Firstly, in Recital C, three conditions were satisfied, because, (i) the plaintiffs' right to operate the business was in accordance with the franchise system as determined by the first defendant; (ii) the plaintiff's right to use a mark, trade secret, confidential information, or any intellectual property, was owned by the first defendant; and (iii) the first defendant also reserved the right to administer continuous control over the operation of the plaintiffs' business. Secondly, in cl. 7, the plaintiffs were also imposed with various obligations by the first defendant, *ie*, payment obligations. The same clause also gave the first defendant the right to exert standards, operating manual, uniformity of operations, source of products, inspection and audit over the plaintiffs' business. There were also 29 sub-clauses therein which comprehensively and cumulatively pointed the licensing agreements were franchising agreements. Thirdly, in cl. 4, the plaintiffs were obligated with various fees and payments to be paid to the first defendant, namely, joining, license, training, marketing, advertising and promotion, royalty and management fees. Therefore,

A although the licensing agreements were titled as such, from the terms therein, which described the business was a franchise, the licensing agreements were in actual fact, franchising agreements. (paras 11, 17 & 25-27)

(2) The various 'freedoms' the defendants claimed the plaintiffs enjoyed in B operating the business negated any notion of control. Although the plaintiffs were certainly given a certain degree of latitude in arranging their schedules, conducting promotion, advertising activities, arranging financial affairs, recruiting teachers and students and *etc*, all these matters were required to be conducted within the framework of the first C defendant's overall control and permissible limits, as well as the dictates of the terms of the licensing agreements. Any transgression would result in the termination of the licensing agreements. This finding coupled with the fact that the licensing agreements, although a franchise had not been registered in accordance with the requirements under s. 6(1), (2) and (B) D of the Franchise Act, by virtue of ss. 2(g) and 24 of the Contracts Act, the licensing agreements were null and void for being in breach of the Franchise Act. (paras 18, 20 & 28-30)

(3) Regarding s. 79 of the Education Act, the MOE's approval was addressed to 'Pengerusi Lembaga Pengelola' (second defendant) and E only allowed the 'kursus-kursus yang diluluskan' to be conducted by the 'Pusat Perkembangan Minda Brain-Zone' owned by the fourth defendant addressed at No. 8-3, Jalan Radin Bagus 8, Bandar Baru Sri Petaling, 57000 Kuala Lumpur. Nowhere in such approval the first defendant was allowed to license other independent business owners to conduct any of F the first defendant's programs at other venues. Although cl. 7.26 of the licensing agreements provided that it was the responsibility of the licensee, *ie*, the plaintiffs, to obtain all the necessary approvals from the MOE in order to operate the business, however, the invocation of the said clause was subject to the first defendant having obtained prior G approval from the MOE for the first and second programs. For this reason, cl. 7.26 could not excuse the first defendant from its failure to obtain an approval from the MOE. The licensing agreements, therefore, were also void for illegality for contravening s. 79 of the Education Act. Section 77 was not applicable as the licensing agreements were for the purpose of conducting brain development programs for young persons. H (paras 31, 39-41, 45-47 & 49)

(4) The plaintiffs pleaded two instances of fraud/misrepresentation by the first to third defendants, namely: (i) the first defendant's programs had the MOE's approval ('first instance'); and (ii) the defendants, during the I programs' introductory sessions, had guaranteed to each of the plaintiffs that 20 new students would enrol each month at their centres ('second

instance'). In respect of the first instance, other than the representation online that the two programs were approved by MOE, Recital A of the licensing agreements also used the words 'authorised by the relevant parties', which must necessarily include the MOE, given the fact that the first defendant's programs were educational in nature. Hence, the fraud/misrepresentation was that the first defendant claimed to the plaintiffs that it had obtained necessary approvals from the MOE to conduct the programs and to license the plaintiff to conduct the same. Whereas for the second instance, there was no fraud/misrepresentation. There was no certainty as to what each of the plaintiffs were verbally informed during the separate introductory sessions. The only common feature shared between them were the slides. However, of the over 30 slides, none had guaranteed the plaintiffs of the enrolment of 20 students per month. There was only one slide that was related to potential profitability from enrolling 20 students per month. Nevertheless, it was not reasonable for the plaintiffs, being tertiary-educated independent business owners, to have believed of the defendants' guarantee. Consequently, the licensing agreements were only void or voidable in the first instance, not the second instance. (paras 52, 54, 58-62 & 66-67)

(5) Any contention that the plaintiffs entered into the licensing agreements due to undue influence ought to be rejected on the facts that: (i) the first to fourth plaintiffs were individuals of academic standing with qualifications from respected tertiary institutions; (ii) all the plaintiffs knew there would be financial outlay before signing the licensing agreements. From a list entitled 'SOP For New Centre Preparation Guidelines' given to them, there were four preceding steps before the signing of such agreements; (iii) before the signing of the licensing agreements, the plaintiffs were given the liberty to seek legal or other advice on the agreements; (iv) the second licensing agreements were entered after the plaintiffs operated their businesses under the first licensing agreements for months; (v) the primary grouse of the plaintiffs were on the lack of profitability, not on the licensing agreements' legality; and (vi) the plaintiffs had known from the start that as independent business owners, they would not be spoon-fed and would be exposed to risks normally associated with running a business. (para 69)

(6) The licensing agreements were void *ab initio*, therefore, there could not have been any invalid termination or breach, post-agreement or otherwise. Since the licensing agreements were void for contravening the Franchise and the Educations Acts, the first and second defendants' counterclaim regarding the alleged invalid termination of the licensing agreements by the plaintiffs and breach of their post-agreement obligations, must fail. Whereas for the first and second defendants'

counterclaim regarding the plaintiffs' alleged infringement of the trademark 'Brain-Zone', it was dismissed on the grounds that: (i) the first plaintiff was not involved in the business; and (ii) there was no evidence proffered relating to the second, fourth and fifth plaintiffs' alleged infringement of the first and second defendants' trademark. Thus, both counterclaims were dismissed with costs. (paras 73-78)

(7) The defendants' contention that the plaintiffs should be denied of any relief due to the doctrine of *in pari delicto* ought to be rejected because, the plaintiffs were only aware about the MOE's approval after the licensing agreements were signed. It was never disclosed to them during the introductory sessions. They had no knowledge regarding the licensing agreements' illegality. Therefore, the defendants could not use their gullibility to excuse their wrongful conduct or to argue that the plaintiffs should have investigated whether the first defendant's programs already had the necessary approvals or not before signing the licensing agreements. It was through the first defendant's slick and fanciful promotions, that the programs had all the necessary approvals, that caused plaintiffs to sign the licensing agreements. (paras 82-86)

(8) The plaintiffs' claim for general damages was allowed to be assessed while the claim for special damages was allowed in the following manner: (i) RM61,500 for the first plaintiff; (ii) RM95,750 for the second plaintiff; (iii) RM103,700 for the third plaintiff; (iv) RM95,750 for the fourth plaintiff; (v) RM103,700 for the fifth plaintiff; and (vi) RM95,150 for the sixth plaintiff. Meanwhile, for the plaintiffs' claim for exemplary damages, there was a blatant disregard of the law by the first defendant, in that: (i) it had exploited the MOE's approval in order to enter into the licensing agreements although it had no right in law with the intention of making huge profits; (ii) it had no qualms to represent to the public at large that it had the approval from the MOE even though the approval was only meant for the fourth defendant to run a single 'Pusat Perkembangan Minda Brain-Zone'; (iii) the first defendant had no concern in causing members of the public that wished to start their own business to contravene the law, *ie*, the Franchise and the Education Acts; and (iv) there were also letters that showed that the (a) plaintiffs had not applied to the Education Departments of several States to set up any 'Pusat Perkembangan Minda Brain-Zone' at all; and (b) plaintiffs had applied to the Ministry of Domestic Trade and Consumer Affairs to register the programs as franchise few years after the licensing agreements were entered between the parties. In these circumstances, exemplary damages should be ordered in the amount of RM300,000 per plaintiff. Further, the total damages awarded would also carry interest at 5% per annum from the date of the writ until the date

of full settlement. Therefore, the first and second defendants' counterclaims were also dismissed with costs of RM30,000 to each of the plaintiffs, subject to allocator. (paras 88-109)

(9) Liability would only be imposable to the first and second defendants. Since the licensing agreements were entered between the plaintiffs and the first defendant, liability to the first defendant was a given. In respect of the fourth defendant, there was nothing wrong in the approval obtained from the MOE. It was the first defendant who had exploited and took illegal advantage of the MOE's approval. No licensing agreements were ever entered between the plaintiffs and the fourth defendant. Hence, no liability should be imposed on the fourth defendant. Whereas for the third and fifth defendants, since they were not involved in the first defendant's shenanigans, they should not be liable to the plaintiffs. Regarding the second defendant, the evidence showed that the actions of the first defendant were the second defendant's machinations. The second defendant was the majority shareholder of both the first and fourth defendants. This coupled with the evidence that showed (i) the MOE's approval was addressed to the second defendant; (ii) the second defendant had counterclaimed alongside the first defendant which indicated he had identified himself and the first defendant as one as far as the business was concerned; and (iii) the second defendant was conversant of the difference between franchising and mere licensing, as he was involved in a business of another franchise years before the licensing agreements were entered with the plaintiffs, the second defendant was fully involved in the first defendant's wrongdoing. Hence, in light of all the factors, there was no hesitation for the corporate personality of the first defendant to be disregarded and the second defendant to be found as the mastermind behind the first defendant's scam. The second defendant was therefore held jointly and severally liable with the first defendant against the plaintiffs. (paras 110-125)

Case(s) referred to:

BK Fleet Management Sdn Bhd v. Stanson Marketing Sdn Bhd [2018] 9 CLJ 449 CA ***(dist)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Janet Ooi Hui Ming v. STC Management Sdn Bhd & Anor [2021] 8 CLJ 952 HC ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 87; [1983] CLJ (Rep) 186 FC ***(refd)***

Khor Yiap Seng v. Soo Geok Ki & Ors [2023] 1 LNS 571 HC ***(refd)***

Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***

Lim Seng Kiat & Anor v. Jee Hing Lim & Anor [2015] 1 LNS 94 HC ***(refd)***

Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Microsoft Corporation v. Conquest Computer Centre Sdn Bhd [2014] 6 CLJ 876 HC ***(refd)***
Munafsya Sdn Bhd v. Proquaz Sdn Bhd [2013] 2 CLJ 189 HC ***(refd)***
Noraimi Alias v. Rangkaian Hotel Seri Malaysia [2009] 9 CLJ 815 HC ***(refd)***
Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***
Rookes v. Barnard & Ors [1964] 1 All ER 367 ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd [2010] 1 LNS 1286 HC ***(refd)***
Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor [2015] 1 LNS 936 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2(g), 16(1), 17, 18, 24(a), (b), 66
Education Act 1996, ss. 77, 79
Franchise Act 1998, ss. 4, 6(1), (2), 6(B)

For 1st, 2nd, 3rd, 4th, 5th & 6th plaintiff - R Rishi, Daljit Singh Harjit Singh & Peh Sue Min Debbie; M/s Daljit Singh Partnership
For 1st, 2nd, 3rd, 4th & 5th defendants - Koh Kean Kang & Yong Siew Lee; M/s Yong SL & Koh
For the 3rd party - Aufa Radzi & Muhammad Danial Iman Ahmad Terrirudin; M/s Skrine

Reported by Syamim Ariffin

JUDGMENT

Azlan Sulaiman JC:

Introduction

[1] In 2016 and 2017, each of the plaintiffs was drawn to the first defendant's Facebook page offering the opportunity to members of the public to run their own independent business. The nature of the business was owning and running a centre dedicated to conducting the first defendant's Brain-Zone Full Brain IQ Program for young children ("the first programme") that they were told had been approved by the Ministry of Education. After they each separately attended an introductory session, they each entered into a licensing agreement with the first defendant ("the first licensing agreement") for the first programme.

[2] A year or two after opening and running their centres on the first programme, they each entered into a second licensing agreement with the second defendant ("the second licensing agreement") to additionally conduct the first defendant's Brain-Zone World Class Memory Program for older children ("the second programme"), also having been told that it had been approved by the Ministry of Education.

[3] Sometime in 2019, the plaintiffs terminated the first licensing agreement and the second licensing agreement (collectively, "the agreements").

[4] Notwithstanding having terminated the agreements, the plaintiffs are by this action seeking to have the agreements declared void, alleging, *inter alia*:

(i) that they are in reality franchise agreements, and are void for illegality for contravening the Franchise Act 1998 ("the Franchise Act");

(ii) that they are void for illegality for contravening ss. 77 and/or 79 of the Education Act 1996 ("the Education Act"); and

(iii) that they are void because the defendants had induced each of them to enter into the agreements by fraud, deceit, misrepresentation and/or undue influence.

[5] The relief they seek in relation to these successful challenges to the validity of the agreements are compensation under s. 66 of the Contracts Act 1950 ("the Contracts Act"), and damages, interest and costs.

[6] The defendants deny all of their claims, and contend that, even if the agreements are void or voidable, the plaintiffs are not entitled to recover any relief from them on the principle of in *pari delicto*.

[7] In addition, the first and second defendants' counterclaim for declarations that the agreements are valid, and for damages and other relief for alleged unlawful termination of the agreements. They further counterclaim against the plaintiffs for damages and other relief for infringement of the first defendant's Brain-Zone trademark ("the first defendant's mark"), alleging that, after the termination of the agreements, the plaintiffs had each operated their own brain development businesses using the first defendant's mark.

[8] Waiting in the wings dependant on the outcome of the plaintiffs' claims against the defendants is the defendants' counterclaim against the legal firm of Messrs Shahran Hashim and its three partners (collectively, "the third parties") for, *inter alia*, negligence in their advice and in the drafting of the agreements.

[9] On 9 December 2020, the sixth and seventh defendants successfully applied to strike out the plaintiffs' claim against them. Thus, the trial proceeded against only the first to fifth defendants.

The Issues

[10] The five issues to be considered and decided are:

A (i) whether the agreements contravene the Franchise Act and are therefore void for illegality;

(ii) whether the agreements contravene ss. 77 and/or 79 of the Education Act and are therefore void for illegality;

B (iii) whether the agreements are void by fraud, deceit, misrepresentation and/or undue influence;

(iv) whether the first and second defendants' counterclaims against the plaintiffs should be allowed; and

C (v) the relief to be ordered and against whom.

Issue 1: Whether The Agreements Contravene The Franchise Act And Are Therefore Void For Illegality

[11] The plaintiffs contend that, despite being entitled "licensing agreements", the agreements are in actual effect franchise agreements because D by their terms the business described therein is a franchise. The defendants maintain they are license agreements as titled.

[12] When determining the true nature of an agreement, a court is required to take an objective approach. The factual matrix forming the background of the contract must be considered to determine the objective and aim or E purpose of the transaction.

[13] In *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127, Gopal Sri Ram JCA (as he was then) said:

> When a court is asked to determine a true nature of a bargain between F contracting parties it is required to take an objective approach. It must have regard to the factual matrix forming the background to the contract to determine the objective aim or purpose of the transaction.
>
> It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the G contract.

[14] Negotiations leading up to the execution of the contract, and the parties' subjective intentions of what each party hopes to achieve are excluded. In *Keng Huat Film Co Sdn Bhd v. Makhanlall Properties Pte Ltd* [1983] 2 CLJ 87, Mohamed Azmi FJ said:

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> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any I individual purpose which either of them hope to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible.

[15] Further, the relationship under a written contract is not determined simply by the title or label the parties ascribe to it. In *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; [1995] 3 MLJ 141, Gopal Sri Ram JCA (as he was then) said:

> But in the construction of contracts the Court is not bound by the labels that parties choose to affix onto the particular document. In all such cases the duty of the Court is clear. And that duty is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.

[16] Thus, it is for this court to determine whether the agreements are licensing agreements or franchise agreements, not what the parties say they are.

[17] Under s. 4 of the Franchise Act, a "franchise" means a contract or an agreement, expressed or implied, whether oral or written, between two or more persons by which all the four cumulative conditions of a "franchise" stipulated in limbs (a), (b), (c) and (e) are fulfilled. The four conditions are:

(i) the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor;

(ii) the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit the franchisee to use the intellectual property;

(iv) the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system; and

(v) in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration.

[18] Under ss. 6(1), 6(2) and 6(B) of the Franchise Act, a franchise must be registered:

> Registration of franchisor
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> 6(1) A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.
>
> (2) Any franchisor who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable:

A (a) if such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;

(b) if such person is not a body corporate, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding one year or to both,

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and for a second or subsequent offence, to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

C Registration of franchisee

6B. A franchisee who has been granted a franchise from a local franchisor or local master franchisee shall register the franchise with the Registrar by using the prescribed registration form within fourteen days from the date of signing of the agreement between the franchisor and franchisee.

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[19] In *Noraimi Alias v. Rangkaian Hotel Seri Malaysia* [2009] 9 CLJ 815, Mary Lim J (as Her Ladyship then was) said:

A quick perusal of the Act shows the regulation of franchise is through a system of registration of franchises. The importance of registration is
E reflected in the imposition of penalties. Unless the person, class of persons, business or industry is exempted from all or any of the provisions of the Act, including the requirement of registration, the failure to register before offering the franchise for sale is an offence.

[20] By ss. 2(g) and 24 of the Contracts Act 1950, the non-registration of
F a franchise renders any agreements relating to it being tainted with illegality, and consequently void. Section 2(g) provides that "an agreement not enforceable by law is said to be void", and s. 24(a) and (b) provide:

The consideration or object of an agreement is lawful UNLESS:

G (a) it is forbidden by a law;

(b) it is of a nature that, if permitted, it would defeat any law.

[21] There are already several instances of agreements being declared void for being in breach of the Franchise Act. These include *SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd* [2010] 1 LNS 1286; [2010]
H MLJU 1845, *Lim Seng Kiat & Anor v. Jee Hing Lim & Anor* [2015] 1 LNS 94, *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor* [2015] 1 LNS 936, *Janet Ooi Hui Ming v. STC Management Sdn Bhd & Anor* [2021] 8 CLJ 952, and *Khor Yiap Seng v. Soo Geok Ki & Ors* [2023] 1 LNS 571; [2023] MLJU 752.

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[22] It is my finding that this case should be added to that list, for the simple reason that those four characteristics that connote a franchise are prevalent throughout the terms of the agreements.

[23] Without in any way setting out an exhaustive list of which terms of the agreements embody those four characteristics, for the purpose of this judgment, I propose only to point out just three of them.

[24] Firstly, Recital C of the agreements (modified for the programme offered), provides:

> The Licensee is desirous of seeking the Licensor's permission to operate ONE (1) unit of training centre solely in providing Brain-Zone Full Brain IQ Program to the students at the Training Centre as specified herein and strictly restricted to that venue, during the effective period of this Agreement, subject further to the terms and conditions as may be imposed by the Licensor from time to time.

[25] In my view, Recital C embodies the first three characteristics of a franchise, namely the plaintiffs' right to operate a business according to the franchise system as determined by the first defendant; the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the first defendant; and first defendant's right to administer continuous control over the first defendant's business operations.

[26] Secondly, all four characteristics are prevalent in cl. 7 of the agreements that extensively set out the plaintiffs' obligations to the first defendant. There include (but are not limited to) maintaining standards, operating manual, uniformity of operations, source of products used, promotions, inspection and audit by the first defendant, payment obligations; *etc*. The 29 sub-clauses are comprehensive, and cumulatively point to the agreements being for a franchise.

[27] Thirdly, cl. 4 of the agreements, which provide for the various fees and payments to be made by the plaintiffs to the first defendant, namely, joining fee, license fee, training fee, marketing, advertising and promotion fee, royalty and management fee.

[28] In the same vein, I rejected the defendants' contentions that the various "freedoms" the plaintiffs were given negated any notion of control. These included the so-called freedom to select location, arrange schedules, conduct promotion and advertising activities, arrange their financial affairs, recruit teachers and students, *etc*. Though certainly the plaintiffs were given a certain degree of latitude with these matters, they were all still to be conducted within the framework of the first defendant's overall control and permissible limits, as well as the dictates of the terms of the agreements. Furthermore, any "transgression" from the first defendant's dictates could result in termination.

[29] It was thus my finding that, the agreements were franchise agreements and not mere licencing agreements.

[30] As at the time of the agreements, the first defendant had not registered as a franchisor under the Franchise Act or abided by the other requirements thereunder, I further held that both of the agreements were null and void for being in breach of the Franchise Act.

Issue 2: Whether The Agreements Contravene ss. 77 And/Or 79 Of The Education Act And Are Therefore Void For Illegality

[31] I would first rule out applying s. 77 of the Education Act 1996, as that is clearly intended for any registered private educational institution conducting "any course of study or training programme jointly, in association, affiliation or collaboration or otherwise, with a university or institution of higher education or other educational institution or organization within or outside Malaysia." Here, the agreements were for conducting brain-development programmes for young persons.

[32] As for s. 79 of the Education Act, it expressly provides:

> (1) Subject to the other provisions of this Act, every educational institution shall be registered under this Act.
>
> (2) An application for registration under this Act shall be made to the Registrar General in such manner as may be prescribed.
>
> (3) The Registrar General may impose such terms and conditions as he deems fit when registering an educational institution under subsection (1).

[33] The defendants essentially take two stands on this issue. The first is that the plaintiffs' pleaded case *vis-à-vis* the Education Act is misrepresentation and not illegality, being that, to induce the plaintiffs to enter into the licensing agreements, the defendants had misrepresented to them that the approvals thereunder had been obtained. That, the defendants say, is wholly different from pleading that the licensing agreements themselves are tainted with illegality for contravening of the Education Act.

[34] The second is that, when the licensing agreements were entered into, the first defendant had already obtained that necessary approval, *vide* a letter dated 1 July 2016 issued by the Registrar General of the Ministry of Education ("the MOE approval"). Thus, the licensing agreements are not tainted with illegality.

[35] I dismiss both contentions.

[36] Firstly, illegality is an issue that the courts can and are bound to deal with, irrespective of whether it is pleaded or not.

[37] In *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281, Peh Swee Chin SCJ said: A

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex-facie* illegal. B

[38] In *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619, Jeffrey Tan FCJ said:

> Clearly, therefore, courts are bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded, and to refuse to enforce the contract. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in *China Road & Bridge Corp & Anor v. DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1: C D
>
> > At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality ... whether or not it is the pleaded case of the parties or whether the issue was raised during the trial. The case of *Blay v. Pollard & Morris* [1930] 1 KB 628 where Scrutton LJ observed: E
> >
> > Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.
> >
> > which has been followed in a number of local cases will not stand to tie the hands of judges to deal with the above issues, or arrest impropriety on its own motion at *limine* ... F

[39] Secondly, the MOE approval did not at all permit the first defendant to conduct any brain development programmes anywhere, let alone license the first programme or the second programme to be conducted in other venues run by other independent business owners. G

[40] Before going on to its terms, I will observe that the MOE approval speaks of "kursus-kursus yang diluluskan" but the incomplete copy of the MOE approval does not state what they are. However, it is clear that the MOE approval was not for any of the first defendant's programmes. H

[41] The MOE approval was addressed to the "Pengerusi Lembaga Pengelola" of "Pusat Perkembangan Minda Brain-Zone", and para. 2.4.1 identifies the second defendant as being that person. It approved a single institution named "Pusat Perkembangan Minda Brain-Zone" to conduct the I

A "kursus-kursus yang diluluskan", at No. 8-3, Jalan Radin Bagus 8, Bandar Baru Sri Petaling, 57000 Kuala Lumpur. This is clear from para. 2 which stated "sebuah institusi" and para. 2.5.2 which categorically stated:

> Kursus-kursus yang diluluskan adalah kepada institusi ini sahaja.

B **[42]** The MOE approval further approved of the following terms, the details of which would obviously have been submitted in the application to the Ministry of Education for the approval:

(i) the "pemilik" of the institute being Safeway Marketing Sdn Bhd, which is the fourth defendant;

C (ii) the five "Ahli Lembaga Pengelola Institusi", which included the second and fifth defendants; and

(iii) Stephanie Khong Kah Mun (DW2) as the "Pengetua" of the Institute.

[43] There is also evidence of a further letter dated 8 December 2017 from D the MOE ("the MOE Supplemental Approval") which was also addressed to the second defendant as "Pengerusi Lembaga Pengelola". It was a favourable response to an application dated 6 December 2017 to change the address of the Institute to No. 57-2, Jalan Radin Tengah, Bandar Baru Sri Petaling, 57000 Kuala Lumpur.

E **[44]** In my view, the application to change the address of the Pusat Perkembangan Minda Brain-Zone showed that the first and second defendants knew that approval had to be obtained to change any of the terms of the MOE approval, even the address where the institute was to conduct the "kursus-kursus yang diluluskan". It has not escaped my attention that that F application to change the address was made on 6 December 2017, which was after all of the plaintiffs had entered into the first licensing agreement. In fact, for the first, fourth and sixth defendants, it was over a year later.

[45] Crucially, the MOE approval did neither envisage nor permit the first defendant owning or operating such an institute, or licensing other G independent business owners to conduct the "kursus-kursus yang diluluskan" at other venues. Indeed, the defendants did not adduce any other approval save for the MOE approval and the MOE supplemental approval.

[46] I have not overlooked that cl. 7.26 of the agreements provides:

H > Notwithstanding anything to the contrary, the Licensee shall solely be responsible and at his own costs and expenses obtain all necessary licenses, permits, approvals in all respect from the Ministry of Education and all relevant authorities to conduct the Business and to operate the business premises or Training Centre and in all other respects.

I **[47]** However, in my view, that clause could only really become operable and invokable in a scenario, such as, if the first defendant had obtained its own MOE approval to conduct the first programme and the second programme and:

(i) it had obtained a further approval from the MOE to conduct the first programme and the second programme at other outlets run by other independent business owners not associated with it; and

(ii) that further approval from the MOE required each of those independent business owners to obtain their separate approvals from the MOE under the umbrella of the first defendant's approvals.

That was never the case here. Simply put, cl. 7.26 of the agreements does not excuse the first defendant's failure to obtain an MOE approval.

[48] In *Munafsya Sdn Bhd v. Proquaz Sdn Bhd* [2013] 2 CLJ 189, the parties entered into an agreement for the plaintiff to run the defendant's Children's Islamic Centre kindergarten programme before the defendant had obtained the requisite approvals under the Education Act to do so. Tengku Maimun J (now Chief Justice) held that agreement to be void. Our case here goes further than that; the first defendant never applied for any such approvals.

[49] I would therefore hold that the agreements are also void for illegality for contravening s. 79 of the Education Act.

Issue 3: Whether The Agreements Are The Result Of The Defendants' Fraud, Deceit And/Or Misrepresentation

[50] Section 17 of the Contracts Act deals with fraud. It provides:

> "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true; (b) the active concealment of a fact by one having knowledge or belief of the fact; (c) a promise made without any intention of performing it; (d) any other act fitted to deceive; and (e) any such act or omission as the law specially declares to be fraudulent.

[51] Section 18 of the Contracts Act 1950 concerns misrepresentation. It reads:

> "Misrepresentation" includes:
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[52] The plaintiffs plead two instances of fraud/misrepresentation, by the first, second and third defendants:

(i) fraud/misrepresentation that the first defendant's programme had the MOE's approval; and

(ii) fraud/misrepresentation that the defendants guaranteed each of the plaintiffs that 20 new students would be enrolled each month at each of their centres.

[53] I would agree with and find for the plaintiffs on the first but not on the second.

[54] In respect of the first, I find for the plaintiffs for several reasons. Firstly, the first defendant represented online to the public at large that its brain development programme was "approved by the Ministry of Education Malaysia".

[55] Secondly, I also believe the testimony of the first plaintiff that those representations were also made at the introductory talks she attended. The slides have been produced.

[56] Thirdly, some of the slides shown at the introductory session state what the plaintiffs needed to do to start their own business offering the first defendant's programmes. They are entitled "Licensee Requirement", "How to join Brain-Zone?" "Setup and renovation of centre includes", "Brain-Zone Training Centre R.O.I Report", "Grand Opening Event", "Site Specification" "Centre Setting", "Marketing Support", "Teachers' Training" and "FAQ".

[57] Crucially, in none of them is there any mention of the need for approval from MOE. That "approval" only appears in cl. 7.26 of the agreements that I highlighted earlier.

[58] Fourthly, Recital A of the agreements (modified for the programmes) expressly states:

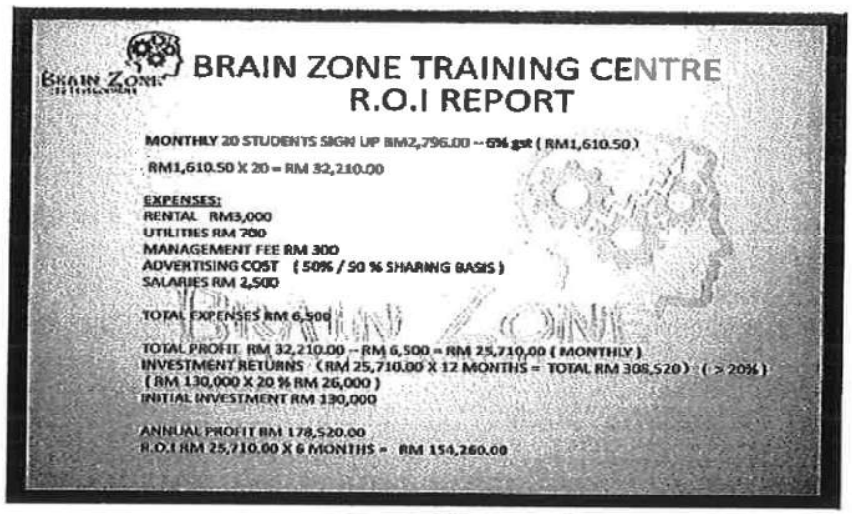
> The Licensor has been authorized by the relevant parties to carry on business in Malaysia under the trade mark of Brain-Zone TM and to use the aforesaid Trade Mark and Copyright of the literary works to provide Brain-Zone Full Brain IQ Program.

[59] The words "authorised by the relevant parties" must necessarily include all the relevant authorities, especially MOE given that the first defendant's programmes were educational in nature.

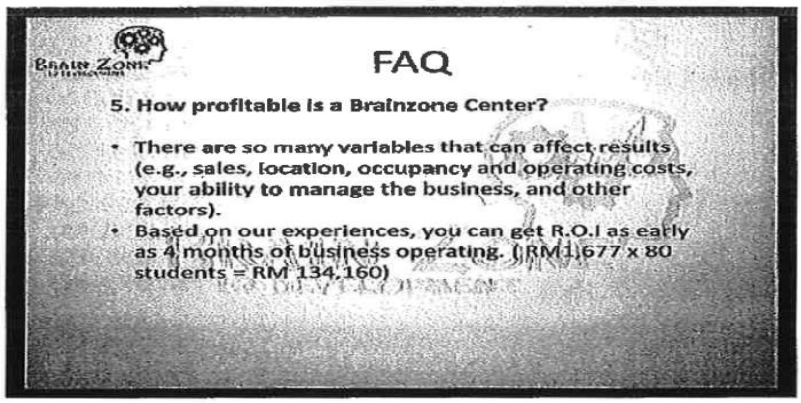
[60] In these circumstances, I find that the fraud/misrepresentation was that the first defendant had obtained all the necessary approvals to conduct the programmes, and to license independent business owners like the plaintiffs to also run those programmes.

[61] As for the second alleged misrepresentation, (*ie*, that the defendants had guaranteed each of the plaintiffs that 20 new students would be enrolled each month at each of their centres), the plaintiffs allege that the misrepresentations were made in the introductory session each of them had attended separately. As only the first plaintiff testified at the trial and the second to sixth plaintiffs did not, there was no certainty as to what each of them were actually verbally informed at the introductory session. The only feature common to the introductory session each of them had attended was the slides.

[62] Of the over 30 slides, only one relates to potential profitability from enrolling 20 students per months. It did not guarantee 20 students per month. It is reproduced below:


BRAIN ZONE TRAINING CENTRE
R.O.I REPORT
MONTHLY 20 STUDENTS SIGN UP RM2,796.00 -- 6% gst (RM1,610.50)
RM1,610.50 X 20 = RM 32,210.00
EXPENSES:
RENTAL RM3,000
UTILITIES RM 200
MANAGEMENT FEE RM 300
ADVERTISING COST (50% / 50 % SHARING BASIS)
SALARIES RM 2,500
TOTAL EXPENSES RM 6,500
TOTAL PROFIT RM 32,210.00 -- RM 6,500 = RM 25,710.00 (MONTHLY)
INVESTMENT RETURNS (RM 25,710.00 X 12 MONTHS = TOTAL RM 308,520) (> 20%)
(RM 130,000 X 20 % RM 26,000)
INITIAL INVESTMENT RM 130,000
ANNUAL PROFIT RM 178,520.00
R.O.I RM 25,710.00 X 6 MONTHS = RM 154,260.00

[63] That slide is also to be read with the following slide:


FAQ
5. How profitable is a Brainzone Center?
• There are so many variables that can affect results (e.g., sales, location, occupancy and operating costs, your ability to manage the business, and other factors).
• Based on our experiences, you can get R.O.I as early as 4 months of business operating. (RM1,677 x 80 students = RM 134,160)

[64] Then, cls. 17.1, 20.2 and 20.3 of the agreements provide as follows:

Clause 17.1

No Inducement. The Licensee hereby acknowledges that the Licensor in giving advice to the Licensee, assisting the Licensee in establishing the business, recommending equipment and materials and assessing the suitability of the location or premises, the Licensor has based its recommendations on experience actually obtained but that the Licensor does give any guarantee or warranty with regard to matters such as sales volume, profitability or any other aspect of the business. The Licensee acknowledges that it has been advised by the Licensor to seek other appropriate independent advice, and that the decision to enter into this Agreement has been taken solely on the basis of the personal judgment and experience of the Licensee. The Licensee thereof acknowledges that no representation, warranty, inducement or promise, express or implied, had been made by the Licensor or relied upon by the Licensee in entering into this Agreement save such as may have been notified in writing by the Licensee to the Licensor in writing and are annexed to and incorporated into this Agreement.

Clause 20.2

Non guarantee of performance, the licenser has furnished opinions and projection based upon hypothetical operating result and that this projection is no way either expressly either or impliedly guarantee that the licenses will be able to obtain the performance and sales as contained in the hypothetical projection and it is expressly agreed that the result of the performance of the licensee in operating the business are matter strictly within the control of the licensee.

Clause 20.3

Entire Agreement. This Agreement shall constitute the entire agreement between the parties in relation to the subject matter thereof, and supersedes all period communications, understandings and agreements relating thereto except as expressly otherwise herein provided, without prejudice to the Operating Manual, instruction or additional terms and conditions as may be set by the Licensor from time to time which the Licensee is bound to comply with.

[65] In *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596, the Court of Appeal had occasion to deal with an entire agreement clause. Nik Hashim JCA said:

Clause 24 is an entire agreement clause that constitutes a binding agreement between the appellant and the respondent with regard to all the matters mentioned in the contract and therefore, in our judgment, the contract does not permit any term to be implied or import any other considerations not in the contract. In *Innterpreneur Pub Co v. East Crown Ltd* [2000] 3 EGLR 31 at p 32 K-L right a somewhat similar provision to cl. 24 is set out. In his judgment, Lightman J opined on the purpose and the effect of an entire agreement where at p 33 A-B left he said:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search.
>
> For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.

[66] It is my finding that there was no misrepresentation on this matter. In my view, it is also neither realistic or reasonable for the tertiary-educated plaintiffs, as independent business owners, to have believed that the defendants would have guaranteed each of them 20 students per month and in the process guaranteed them profits. All that was represented to them was the business structure and support. It would have been up to each plaintiff to make a go of the business opportunity presented.

[67] I would therefore find that the agreements are not void or voidable on the ground of any representation as to the number of students that would be enrolled each month or on profitability. It would only be voidable on the ground of fraud/misrepresentation that the first defendant's programmes had the approval of the MOE.

Undue Influence

[68] Section 16(1) of the Contracts Act 1950 states the following of 'undue influence':

> A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

[69] I would reject any contention that the plaintiffs entered into the agreements under the undue influence of any of the defendants, for several reasons:

(i) the first to fourth plaintiffs are individuals of academic standing, respectively holding qualifications in music, accounting and finance, mechanical engineering and business administration from respected tertiary institutions. At the time they entered into the agreements they were all in their 30s. The fifth and sixth plaintiffs are private limited

companies incorporated in Malaysia by competent persons. Those facts indicate a certain degree of independent thought and circumspection in their quest to become independent business owners;

(ii) after expressing an interest in setting up their own centres, they were each given a list entitled "SOP For New Centre Preparation Guidelines". Step 5 was the signing of the license agreement, with the preceding four steps being towards formally setting up and preparing their businesses and premises. So, they all knew that there would be financial outlay even before signing the license agreement;

(iii) at any time before signing the agreements, they were at liberty to seek legal or other advice on the agreements. If the terms of the agreements were not to their satisfaction or differed from what they believe they had been informed at the introductory session, then they could have chosen to either negotiate its terms or refuse to proceed with them. But just because they feared they may lose the expenses they had already incurred in securing premises for their centre did not constitute undue influence by the first defendant;

(iv) they entered into the second license agreement after carrying out the business under the first licence agreement for months, if not years. The details of the dates they each entered into the agreements is in Table A below:

Table A

Plaintiff	Date of 1st Agreement	Date of 2nd Agreement
1st	25 June 2016	19 July 2018
2nd	22 October 2016	19 July 2018
3rd	26 April 2016	19 July 2018
4th	22 October 2016	19 July 2018
5th	26 April 2017	19 July 2018
6th	22 October 2016	19 July 2018

(v) on the evidence, their primary grouse was on the lack of profitability of the venture, not the legality or otherwise of the business. On the evidence, the motivating factor was their desire to own their own business and earn a sizeable income; and

(vi) the plaintiffs knew from the start that they would be independent business owners. As independent business owners, one would expect not to be spoon-fed but to have a certain degree of autonomy, independent thought and choice, and be expected to be exposed to risks, trials and tribulations normally associated with running a business.

[70] I therefore reject their claim to invalidate the agreements on the ground of undue influence.

Issue 4: Whether The First And Second Defendants' Counterclaim Against The Plaintiffs Should Be Allowed?

[71] The first and second defendants' counterclaim is founded on the following premises:

(i) that the plaintiffs' termination of the agreements was invalid and that they had breached their post-agreement obligations to the first defendant; and

(ii) that, notwithstanding the termination of the agreements, the plaintiffs opened their own centres for brain development programmes using the first defendant's registered trademark, thereby infringing it. The first defendant's mark looks like this:

[72] I would dismiss both.

[73] In respect of the plaintiffs' alleged invalid termination of the agreements and breach of their post-agreement obligations, since the agreements are void *ab initio*, there could have not been any invalid termination or breach, post-agreement or otherwise.

[74] As the agreements are void for contravening the Franchise Act and the Education Act, this counterclaim must fail.

[75] As for trademark infringement, the first and second defendants allege:

(i) that the first plaintiff infringed the first defendant's mark in opening and operating a business called "Mighty Mind Training Centre" which used the first defendant's mark; and

(ii) the second, fourth and fifth plaintiffs infringed the first defendant's mark in changing the name of their respective centres to "Smart Dumbo" which used the first defendant's mark.

[76] I rejected the allegation of trademark infringement against the first plaintiff as I accepted her evidence that she was not involved in that business. I make no finding whether that business used or infringed the first defendant's mark.

[77] I rejected the allegation of trademark infringement against the second, fourth and fifth plaintiffs as there was no evidence of it.

[78] I accordingly dismiss the first and second defendants' counterclaims with costs.

Issue 5: The Relief/Orders To Be Made And Against Whom

The Relief

[79] In finding that the agreements contravene the Franchise Act 1998 and the Education Act and were the result of fraud/misrepresentation as to the MOE approval, I would therefore declare them void *ab initio*.

Compensation Under s. 66 Of The Contracts Act

[80] Section 66 of the Contracts Act 1950, under the heading "Obligation of person who has received advantage under void agreement, or contract that becomes void" provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[81] The defendants contend that the plaintiffs should be denied relief on the principle of in *pari delicto*, *ie*, that a claimant should be denied relief where both it and the respondent are aware of the illegal nature of the contract and are equally at fault.

[82] I reject the defendants' contention. The second defendant testified that the first plaintiff was not shown the MOE letter at the introductory session she attended, and the other plaintiffs all made police reports that they were not shown it either. This means that the MOE letter would only have been known to the defendants and had not been disclosed to the plaintiffs when they signed the agreements.

[83] The Court of Appeal decision in *BK Fleet Management Sdn Bhd v. Stanson Marketing Sdn Bhd* [2018] 9 CLJ 449, the defendants rely on can be distinguished on its facts. In that case, the court found that the parties had acted together in such a manner as to circumvent the Commercial Vehicle Licensing Board Act 1987.

[84] Here, I accept the plaintiffs' contention that they only found out about the MOE letter in 2019 after both of the agreements had been signed. Thus, I further find that the plaintiffs had no knowledge of any illegality in the agreements.

[85] It is also my view that, it is not open to the first defendant in this case to argue that the plaintiffs should have investigated and ascertained for sure that the first defendant had the necessary approvals and that its programmes

did not contravene the law. Through its slick and fanciful self-promotion and advertising, the first defendant paraded itself as having the necessary approvals, and the plaintiffs fell for it. The first defendant cannot use their gullibility to excuse its wrongful conduct.

[86] I therefore reject the defendants' contention that the plaintiffs should be denied any relief on the principle of in *pari delicto*.

[87] In *Janet Ooi Hui Ming v. STC Management Sdn Bhd & Anor* [2021] 8 CLJ 952, upon declaring the licensing agreement void for contravening the Franchise Act, Ahmad Fairuz Zainol Abidin J allowed the plaintiff to recover the various sums she had spent, including in purchasing teaching materials, staff costs and renovating the premises. However, as the plaintiffs could have but did not expressly plead these particular quantifiable special damages, I did not enquire into or allow them.

[88] I nevertheless accept the plaintiffs' evidence of the monies they had paid to the first defendant in respect of the agreements. I would therefore allow the plaintiffs' claims for special damages in the following amounts:

First Plaintiff:	RM 61,500
Second Plaintiff:	RM 95,750
Third Plaintiff:	RM103,700
Fourth Plaintiff:	RM 95,750
Fifth Plaintiff:	RM103,700
Sixth Plaintiff:	RM 95,150

[89] I would also allow their claim for general damages for the misrepresentation relating to the MOE approval, to be assessed.

Exemplary Damages

[90] In *Rookes v. Barnard & Ors* [1964] 1 All ER 367, the House of Lords held that one of the situations in which exemplary damages are ordered is where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff. Lord Devlin said:

> Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter.

[91] In *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784, Zawawi Salleh JCA (as he then was) said:

> The exemplary damages or punitive damages – the two terms now regarded as interchangeable – are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff.

[92] Under the MOE approval, only the fourth defendant was entitled to open and operate the Pusat Perkembangan Minda Brain-Zone. That MOE approval was also of limited scope.

[93] One of the slides shown to the plaintiffs at the introductory session attests to "Top 10 Grand Opening Sales". This means that, by the time the plaintiffs attended the introductory session, the first defendant had already entered into well over ten such license agreements with other independent business owners all over Peninsular Malaysia. The first defendant was clearly exploiting and misusing the MOE approval granted to the fourth defendant to enter into all of these license agreements, to run its own brain development programmes, when it simply had no right in law to.

[94] These unauthorised and illegal actions clearly indicate that the first defendant was unabashedly seeking to make huge profits that not even the fourth defendant could have made from a single Pusat Perkembangan Minda Brain-Zone under the MOE approval. In doing so, the first defendant obviously had no qualms in making misrepresentations to the public at large that it had that approval, in order to make that happen.

[95] The first defendant also had no qualms about inducing members of the public wishing to start their own business from contravening the law. Each of them would have been in contravention of the Education Act and the Franchise Act. Exposing them to that was dearly not the first defendant's concern.

[96] The plaintiffs have also adduced letters *circa* 2020 from the Education Departments of Penang, Johor, Selangor, Perak, Perlis, Kedah, Terengganu, Negeri Sembilan, Pahang, Kelantan Sabah, Sarawak, Melaka and the Federal Territories of Putrajaya and Labuan of not having received any application to set up any Pusat Perkembangan Minda for the Brain-Zone programme in their State.

[97] There is also evidence of a letter dated 20 September 2020 from the Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna (Ministry of Domestic Trade And Consumer Affairs) that the first defendant had applied to register a franchise under the Franchise Act on 11 October 2019, approved on 13 March 2020. That approval was between three or four

years after the first license agreement with each of the plaintiffs, and the application itself was filed just days before this action was filed. That not only smacks of afterthought on the first defendant's part but also tacit acknowledgment that it needed to register under and comply with the Franchise Act.

[98] All of these matters show a blatant disregard for the law. Our courts implement the laws and cannot condone any blatant breach of them.

[99] In these circumstances, I find that exemplary damages should be ordered.

[100] In view of the evidence of the substantial income that the first defendant was earning from each of the plaintiffs in the form of the various fees prescribed by the agreements, I am of the view that the exemplary damages to be ordered should also be substantial.

[101] I could not, however, agree to the RM10,000,000 the plaintiffs had claimed as exemplary damages, because that amount was not justifiable, and ordering it would unjustly enrich the plaintiffs. The agreements did not envisage any of them making that kind of income or profit from the agreements.

[102] In *Microsoft Corporation v. Conquest Computer Centre Sdn Bhd* [2014] 6 CLJ 876; [2014] 7 MLJ 243, Umi Kalthum J (as she then was) ordered the defendant to pay exemplary damages of RM200,000 to the plaintiff for copyright infringement, because the defendant's conduct was calculated by him to make a profit for himself at the plaintiff's expense.

[103] It is my finding that, although that cause of action was on a wholly different footing, and taking into account that that was now almost ten years ago, I find that an amount of RM300,000 per plaintiff is reasonable to be imposed here. After all, this was a case of the first defendant not just causing unsuspecting members of the public to spend out of their hard-earned savings on an illegal venture, but also the first defendant attempting to circumvent two Acts of Parliament.

[104] The other cases hitherto mentioned did not involve transgressions on this scale. In the *Munafsya* and *SP Multitech Intelligent Homes* cases, the defendant had entered into a franchise agreement with the plaintiff just months before registering as a franchisor. In the *Janet Ooi Hui Ming* and *Khor Yiap Seng* cases, the parties had entered into a single licensing agreement which was held to actually be a franchise agreement. The *Lim Seng Kiat* and *Tea Delights* cases involved the sale of a non-registered franchise business. Here, the first defendant was manipulating the MOE approval given to the fourth defendant to represent to the public that it had the requisite approval to conduct and license out the conduct of the first programme and the second programme.

[105] I therefore ordered that the first defendant should pay to each of the plaintiffs the sum of RM300,000 as exemplary damages. That amount hopefully conveys this court's indignation and fulfils the punishment and deterrent purposes for awarding such damages.

[106] Whilst that may come to RM1.8m overall, for all intents and purposes, this action consists of six separate claims by the plaintiffs here through one suit. That saved the defendants from having to face and the court from having to decide six separate suits of the same nature. Thus, this award of RM300,000 per plaintiff as exemplary damages is to be viewed as an award to each of them separately.

[107] The total damages awarded to each plaintiff are to carry interest at 5% per annum from the date of the writ (*ie*, 24 October 2019) until date of full settlement.

[108] I also dismissed the first and second defendants' counterclaim with costs.

[109] For costs, I awarded each plaintiff costs of RM30,000, subject to allocator.

Which Of The Defendants Is Liable To The Plaintiffs

[110] It is my finding that, liability to the plaintiffs is imposable only on the first and second defendants, and not on any of the other defendants.

[111] Firstly, the agreements were entered into by the plaintiffs with the first defendant only. The first defendant's liability to the plaintiffs is a given.

[112] There was nothing wrong or illegal, *per se*, with the MOE approval that the fourth defendant obtained from the Ministry of Education. It was the first defendant who exploited and took illegal advantage of it. As there were no agreements between the plaintiffs and the fourth defendant, then there was no wrongdoing by the fourth defendant to the plaintiffs. That rules out imposing liability on the fourth defendant.

[113] Likewise, the fifth defendant was only a director and minority shareholder (30%) of the fourth defendant, but is neither a director nor shareholder of the first defendant. There was no evidence that he was involved at all in any of the first defendant's shenanigans. That rules out imposing liability on the fifth defendant.

[114] As for third defendant, I accepted the second defendant's evidence that the third defendant is his mother, that he had added her as a director and shareholder of the first defendant to meet registration of company requirements, and that she was not involved at all in the first defendant's business. Indeed, the plaintiffs did not testify to having dealt with the third defendant at all. I accordingly find that the third defendant is not liable to the plaintiffs.

[115] The second defendant's position is wholly different.

[116] In *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719, Richard Malanjum CJ (Sabah & Sarawak) (as he then was) said:

> But in the event that we should, we are of the view that it is now settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality.

[117] In *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821; [2021] 3 MLJ 622, Nallini Pathmanathan FCJ said:

> It is important to note that the case-law in both this jurisdiction and the common law position in the United Kingdom recognises that there subsists a well-established principle that if a company's separate legal personality is being abused for the purpose of wrongdoing, the court is justified in disregarding the corporate personality of the company.

[118] In my view, that would only apply to the first defendant and not to the fourth defendant, because it was the first defendant that had entered into the illegal agreements with the plaintiffs.

[119] I find that the first defendant's actions were actually the actions and machinations of the second defendant. He was the founding director of both the first defendant and the fourth defendant, and is the majority shareholder of both. By virtue of his evidence about the actual involvement of the third defendant in the first defendant, I take it that the 15,000 shares in the first defendant in the third defendant's name are actually his. His 232,500 shares out of 300,000 in the first defendant make him a 77% shareholder. He also holds 70% of the shares in the fourth defendant (*ie*, 35,000 out of 50,000).

[120] The first defendant's business is "Children Education and Tuition Centres". In 2019, the first defendant generated a revenue of almost RM5m, with profits in the hundreds of thousands. The first defendant did not adduce any evidence of any education or tuition centres it was running, and there was no evidence of any approvals to do so. On the other hand, the fourth defendant is recorded as having no revenue at all. This leads to the reasonable and logical assumption that the source of that first defendant income was wholly (or at least substantially) from those licensing agreements.

[121] The MOE approval is also addressed the second defendant as the "Pengerusi Lembaga Pengelola" of the Pusat Perkembangan Minda Brain-Zone. He was therefore fully involved in the application for it to the Ministry of Education, would have known of its terms and limitations, and would have been hugely instrumental in the idea of and decision to exploit

and illegally take advantage of it, to deliberately use it through the first defendant (and not the fourth defendant) to entice the plaintiffs and others to enter into all of those license agreements, solely to illegally monetise the MOE approval to make huge profits.

[122] Seeing the success of selling and monetising the first programme, he would then have been highly instrumental in coming up with the second programme to illegally expand the first defendant's profits. And his own. And "selling" that off to the plaintiff's through the second licensing agreement.

[123] Further, the second defendant counterclaiming alongside the first defendant against the plaintiffs, even for infringement of the first defendant's mark, indicates strongly that he identifies himself and the first defendant as one, synonymous as far as the business is concerned. As the only *de facto* director of the first defendant, I find that he is the alter ego of the first defendant, and the mastermind of all of the first defendant's schemes. All the roads of wrongful acts of the first defendant led to the second defendant.

[124] There was also evidence that the second defendant had for many years prior to the agreements been involved in the franchise of a restaurant named "Shunka". So, he knew of the difference between franchising and mere licensing.

[125] In the light of all of these factors, I therefore have no hesitation in disregarding the corporate personality of the first defendant and finding the second defendant to be the mastermind behind the first defendant's scam, and to being liable jointly and severally with the first defendant to the plaintiffs.

Conclusion

[126] In conclusion, I make the following judgment in favour of all six plaintiffs against the first and second defendants:

(i) that the agreements entered into between the plaintiffs with the first defendant be declared void *ab initio*;

(ii) that the first and second defendants are jointly and severally liable to the plaintiffs for the following sums under s. 66 of the Contracts Act 1950:

First plaintiff:	RM 61,500
Second plaintiff:	RM 95,750
Third plaintiff:	RM103,700
Fourth plaintiff:	RM 95,750
Fifth plaintiff:	RM103,700
Sixth plaintiff:	RM 95,150

(iii) that the first and second defendants are jointly and severally liable to each of the plaintiffs for general damages, to be assessed;

(iv) that the first and second defendants are jointly and severally liable to each of the plaintiffs for the sum of RM300,000 each as exemplary damages;

(v) that the first and second defendants are jointly and severally liable to each of the plaintiffs for interest at the rate of 5% per annum from the date of the writ (*ie*, 24 October 2019) until full settlement;

(vi) that the first and second defendants' counterclaim on all damages be dismissed with costs; and

(vii) that the first and second defendants are jointly and severally liable to each of the plaintiffs for costs of RM30,000 each plaintiff, subject to allocator.